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HAROLD B. WILLEY,

No. 657.

IN THE

SUPREME COURT OF THE UNITED STATES.

J. STACEY HENDERSON,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes the Petitioner, J. Stacey Henderson, and presents this, his Petition for Rehearing in the above styled cause, upon the grounds hereinafter stated.

PRELIMINARY STATEMENT.

Appellant was convicted under Count One, charging the perpetration of a fraud upon one Keller. In the first opinion in this case, 202 F. 2d 407, Judge McAllister, accurately stating the factual situation described by the record, said:

> "In this case, appellant made no representations to Keller, and Keller did not even know that appellant was associated in the matter until long after he had mailed his check to Pirtle; and Pirtle himself made no representations to Keller. Keller sent his check through the mail to purchase the interest without any

inquiry about the matter or without any persuasion on the part of anyone. He stated that he had known Pirtle for a long time and just mailed his check to him for the purpose of buying an interest.

"There must be some relationship between the transaction involving the use of the mail and the scheme to defraud. McLendon v. United States, 6 Cir., 2 F. 2d 660. Keller had heard nothing whatever about the alleged scheme and had mailed his check without any knowledge concerning it. The mailing of the check was in no way related to a scheme to defraud. It, accordingly, was not mailed in furtherance of or execution of such a scheme. The record discloses no evidence to support appellant's conviction on Count 1 of the indictment."

In denying the Petition for Certiorari, this court did not consider certain substantial questions of general importance, which, while available to Petitioner, were not presented in the Petition for Certiorari, to-wit:

I.

The manner in which Keller, on his own motion, injected himself into this matter about which he practically knew nothing at the time when he mailed his check to Pirtle for an interest without having made any inquiries, was responsible for the conclusion of Judge McAllister on the first appeal, above stated.

On the trial in the instant case, Keller testified that when he learned that Pirtle was in some way interested in an oil deal he sent him a check for Five Hundred Dollars, so doing after he was unable to reach Pirtle over the telephone but had talked to his wife, Mrs. Pirtle. Again Keller testified that he never talked to Pirtle (App. 165a). He never saw or heard of Henderson and, with reference to the share purchased by him, testified: "**I just bought it on**

my own hook, you might say. I bought it through him (Pirtle) because I thought where he put his money would be good." Keller further testified concerning his evidence at the first trial:

> "Q. And you did not say a thing at the last trial about telephoning Jack Pirtle, or Mrs. Jack Pirtle, or anybody else in Memphis before you mailed that check, did you? A. No" (App. 166a-167a).

Again he said that **no one sold him this interest;** that he purchased it because "he knew Pirtle had stock in it," and that he did not know who was interested in the venture except Pirtle, Hammons and Ross (App. 166a-173a).

At the trial in the instant case, Pirtle testified that Keller

> ". . . called me up over the telephone and wanted to know what I thought about the oil proposition in Louisiana. I told him, 'I think that it is good, for the reason is the representation on the first well is two hundred fifty barrels oil well a day and Mr. Henderson assures me the second well would be five hundred to a thousand barrels of oil, and would bet me one thousand dollars—to anybody—that it did not do that.' He said if it did not do that, he would give anybody one thousand dollars to prove his well is well worthwhile.
>
> "I told him, 'If you want to invest some money and be sure of it, go ahead, buy some' " (App. 187a).

Pirtle testified that after the two-hundred-fifty-barrel well came in on Saturday, Henderson informed him on Tuesday that they were having trouble with that well, that it was stopped up, and thereafter Pirtle visited the well and knew no oil was being pumped therefrom. This was before Pirtle made the sale to Keller, which occurred on November 27, 1948 (App. 198a).

Pirtle is the only witness who testified that Henderson said the first well was bringing in two hundred fifty barrels a day. The few other government witnesses that testified concerning Henderson's statements of prospects of this first well placed this estimate much less (App. 94a, 101a, 116a, 117a, 211a).

Pirtle further testified on cross-examination that he called Keller and told him to mail him a check and Keller did (App. 199a). Henderson was not in Memphis at the time of the transaction between Keller and Pirtle (App. 200a).

Mrs. Pirtle was not called as a witness by the government.

II.

Bearing in mind that Petitioner was convicted solely upon the testimony of Pirtle, relating to the Keller check involved in Count One of the indictment, and that Pirtle received a commission on any sales made by or through him, it seems clear of doubt that, if any fraud was perpetrated, Pirtle was a guilty participant in that fraud. It was, therefore, reversible error for the court to fail to give the cautionary instructions set out in Petitioner's Special Request No. 24, which states in substance that, if Pirtle made the alleged false and fraudulent statements to Keller, the victim in Count One, knowing they were false or made them with reckless indifference as to whether they were true or false, then his testimony should be "accepted with caution and the jury not place too much reliance thereon" (App. 498a-521a).

Counsel for Petitioner had argued to the jury that Pirtle was guilty of false testifying and that, according to his own admissions, he should be on trial rather than Petitioner (App. 471a).

In view of this argument, it was flagrant error to refuse a cautionary request.

Holmgren v. U. S., 217 U. S. 509-523;
Crawford v. U. S., 212 U. S. 183-205;
Shields v. U. S., 3rd Cir., 17 F. 2d 66;
McLendon v. U. S., 5th Cir., 19 F. 2d 465, 466.

"Where the government's case may stand or fall on the jury's belief or disbelief of one witness, his credibility is subject to close scrutiny." **Gordon v. U. S.**, 344 U. S. 414, 417.

It should be observed that the request did not state as a matter of law that Pirtle was an accomplice, but left his status to be determined by the jury.

III.

Pirtle, the lone witness testifying to the use of the mails under Count One, materially changed his testimony in the second trial (App. 194a-202a). In view of this change in the testimony of the witness Pirtle, there was no room for the application of the rule expressed in the phrase "law of the case," **Aetna Life Insurance Company v. Wharton**, 8th Cir., 63 F. 2d 378, 379, invoked by Judge Miller in the majority opinion (App. 218 F. 2d 14-16).

IV.

There was not a scintilla of evidence in the record that Petitioner, directly or indirectly, "for the purpose of executing the aforesaid scheme * * * knowingly caused to be delivered by mail * * * a check * * * of Five Hundred Dollars drawn by J. W. Keller * * * enclosed in an envelope addressed to 'Mr. Jack Pirtle, c/o Hi-Hat Cafe, Memphis, Tennessee.'"

As heretofore stated, Keller testified that he mailed this "on his own hook (App. 164a-169a).

Pirtle was an accomplice. His testimony was inconsistent and contradictory. A conviction should, therefore, not be sustained upon his uncorroborated testimony as to the mailing of the check. Wharton On Criminal Evidence, 10th Ed., Vol. I; **Sykes v. U. S.**, 8th Cir., 204 F. 909-913; **McGinniss v. U. S.**, 2nd Cir., 256 F. 621, 626.

Wherefore, Petitioner prays that the court reconsider its action in denying the Petition for Certiorari and that upon such reconsideration the Writ of Certiorari be granted, as prayed for in the Petition, and the case set for hearing on the merits.

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State of Tennessee, }
County of Shelby. }

I, L. E. Gwinn, Attorney for Petitioner, hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay; I further certify that the Petition is restricted to the grounds specified in Rule 58 (2) of this Court.

.....

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